

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	2:09-cr-00303-JCM-LRL
v.	)	
	)	MOTION TO DISMISS FOR
ERIC LEON CHRISTIAN,	)	VIOLATION OF THE SPEEDY TRIAL
	)	ACT AND SIXTH AMENDMENT (#47)
Defendant.	)	
_____	)	

**REPORT & RECOMMENDATION**

The defendant, Eric Leon Christian, is under indictment on two counts of Interstate Communications of Threats in violation of 18 U.S.C. § 875(c). The matter before the court is Christian's Motion to Dismiss for Violations of the Speedy Trial Act and the Sixth Amendment (#47), in which he contends that the government has deprived him of his constitutional right to a speedy trial in violation of the Sixth Amendment.<sup>1</sup> Also under submission is the government's Opposition (#51). No reply was filed.

**BACKGROUND**

Christian made his initial appearance in this court on July 21, 2009 and was represented by Richard Frankoff of the Federal Public Defender's ("FPD") office. On July 29, 2009, Christian filed a Motion to Strike With Restitution (#15) in pro per. On August 4, 2009, the court struck the Motion to Dismiss (#15) pursuant to LR IA 10-6(a), which provides that a defendant who is represented by

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<sup>1</sup>Although Christian's motion is styled, in part, as a Motion Dismiss for Violation of the Speedy Trial Act, Christian does not provide any argument or analysis of the alleged violation of the Speedy Trial Act. Instead, the Motion concentrates on the analysis of a Sixth Amendment speedy trial violation. The court will therefore address only the assertion of a constitutional violation of the right to speedy trial.

1 counsel may not file motions on his own behalf. Minute Order (#16). On August 7, 2009, Christian  
2 appeared for arraignment and pleaded not guilty. Minutes (#17). Pursuant to Notice of Hearing (#24),  
3 jury trial was set for September 21, 2009. On August 18, 2009, Frankoff filed a sealed Motion for  
4 Hearing. A hearing on the motion was held September 9, 2009, during which Christian specifically  
5 requested that he not be represented by the FPD. Minutes (#27). The court relieved Frankoff as counsel  
6 and, on September 15, 2009, appointed CJA panel attorney Travis E. Shetler to represent Christian. The  
7 next day, Christian filed another Motion to Dismiss (#31) in pro per, which this court struck on  
8 September 24, 2009, again because Christian was represented by counsel. Minute Order (#32).

9 On September 18, 2009, Shetler filed defendant's first Stipulation to Continue Trial (#29). The  
10 Stipulation requested that the trial, then scheduled for September 21, 2009, be continued for at least  
11 forty-five (45) days, "to allow new Counsel for the Defendant . . . the opportunity to evaluate the  
12 government's claims, adequately discuss same with the Defendant and also to give Counsel sufficient  
13 time to prepare for negotiation of the case or trial as the circumstances may require." Stipulation (#29)  
14 at ¶ 5. The Stipulation further states, "Counsel for the Defendant has discussed the continuance with  
15 the Defendant and informs this Court and the Government that there is no objection to the continuance  
16 sought herein." *Id.* at ¶ 1. The court granted the continuance, finding the additional time requested to  
17 be excludable for purposes of the Speedy Trial Act. Order (#30) at 4. Trial was set for November 16,  
18 2009.

19 On November 12, 2009, Shetler filed an *Ex Parte* Motion for a Psychiatric Evaluation (#35) and  
20 a Second Stipulation to Continue Trial (#36), followed the next day by a Corrected Second Stipulation  
21 (#37). The Corrected Second Stipulation requested that the trial be continued for at least 90 days to  
22 allow time for the evaluation of Christian. Shetler stated, "Counsel for the Defendant has discussed the  
23 continuance with the Defendant and informs this Court and the Government that there is an objection  
24 to the continuance sought herein." Corrected Second Stip. (#37) at ¶ 1. On November 16, 2009, the  
25 court granted a second continuance, again finding the delay excludable for purposes of the Speedy Trial  
26 Act. Order (#40) at 4. Trial was set for February 22, 2010.

On November 24, 2009, the court held a hearing on Shetler's Motion for Psychiatric Evaluation (#35). During the hearing, Christian requested representation by a new attorney and specifically requested Gary L. Meyers. Minutes (#41). The court granted Christian's request and accordingly denied the Motion for Psychiatric Evaluation without prejudice subject to refile by Meyers, if Meyers deemed it appropriate. *Id.*; *see also* Order (#42) (appointing Meyers as counsel).

On February 9, 2010, Meyers filed defendant's instant Motion to Dismiss (#47). On February 17, 2010, Meyers filed an *Ex Parte* Motion for Psychiatric Evaluation (#48), which this court granted on March 5, 2010. Order (#54). On February 18, 2010, defendant's Third Stipulation to Continue Trial (#49) was filed, "to allow [the Motion for Psychiatric Evaluation] to be considered and, if granted, for the evaluation to take place." The Third Stipulation was granted on February 25, 2010. Order (#50). The court found the delay excludable under the "ends of justice" provision, as well as pursuant to 18 U.S.C. § 3161(h)(1)(A). *Id.* at 2. Trial is currently set for July 12, 2010.

### DISCUSSION

The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." Excessive post-indictment delay is barred by the Sixth Amendment right to a speedy trial. *United States v. Marion*, 404 U.S. 307, 320 (1971). Before the court will dismiss the indictment on the basis of prejudicial delay, however, the defendant must demonstrate that the delay actually or substantially prejudiced his right to a fair trial. *Marion*, 404 U.S. at 324. In *Barker v. Wingo*, the Supreme Court enunciated a four factor balancing test used to assess an alleged violation of the speedy trial right. 407 U.S. 514, 519 (1972). Specifically, courts consider: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his rights; and (4) prejudice to the defendant. *Id.* at 529. Courts "'regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" *United States v. Tanh Huu Lam*, 251 F.3d 852, 856 (9th Cir. 2001) (quoting *Barker*, 407 U.S. at 533).

The first factor, length of delay, is a threshold issue. *See United States v. Beamon*, 992 F.2d

1 1009, 1012 (9th Cir. 1993). Only where the delay is “presumptively prejudicial” must a court inquire  
2 into the other factors, “since, by definition, [a defendant] cannot complain that the government has  
3 denied him a ‘speedy’ trial if it has, in fact, prosecuted him with customary promptness.” *Doggett v.*  
4 *United States*, 505 U.S. 647, 651-52 (1992). Thus to trigger a speedy trial inquiry, Christian must first  
5 show that the period between his indictment and trial has reached a threshold point of “presumptively  
6 prejudicial” delay. *Beamon*, 992 F.2d at 1012. The Ninth Circuit has found a six month delay to be  
7 “borderline,” but noted that “the lower courts have generally found post-accusation delay  
8 ‘presumptively prejudicial’ at least as it approaches one year.” *Lam*, 251 F.3d at 856 (quoting *Doggett*,  
9 505 U.S. at 652 n.1). The length of delay that will provoke a speedy trial inquiry, however, “is  
10 necessarily dependant upon the peculiar circumstances of the case.” *Id.* (quoting *Barker*, 407 U.S.503-  
11 31) (“To take but one example, the delay that can be tolerated for an ordinary street crime is  
12 considerably less than for serious, complex conspiracy charge.” *Id.*).

13 Here, approximately nine months have elapsed since the defendant’s initial appearance on July  
14 21, 2009 and this court’s review of the motion. The delay is thus somewhere between “borderline” and  
15 “presumptively prejudicial.” Although the charges against Christian are not particularly complex, other  
16 extenuating circumstances—his requests for new counsel and his counsels’ requests for psychological  
17 evaluation—have delayed the time for trial in this case. Thus while the length of delay, on its own, is  
18 approaching the “presumptively prejudicial” point, the particular circumstances which have caused the  
19 delay caution against a presumption of prejudice. The court thus finds this factor to weigh neither in  
20 favor of the motion to dismiss nor against it. Inasmuch as the length of delay is not obviously  
21 *nonprejudicial*, however, the court will consider the remaining *Barker* factors.

22 The next *Barker* factor, reason for the delay, weighs heavily against Christian insofar as the  
23 delay is attributable to Christian and his attorneys. Christian has requested re-appointment of counsel  
24 twice in this case. The first Stipulation to continue followed the assignment of Shetler as Christian’s  
25 second counsel. Because Shetler was assigned six days before the trial date, he reasonably sought a  
26 continuance to allow him time to properly prepare the case and his client for trial. Though Christian

1 now maintains that he did not agree to the stipulation, the stipulation itself clearly states, “Counsel for  
2 the Defendant has discussed the continuance with the Defendant and informs this Court and the  
3 Government that there is no objection to the continuance sought herein.” Stipulation (#29) at ¶ 1. Even  
4 were the court to accept Christian’s claim that he did not agree to the continuance, the continuance was  
5 necessary to allow Shetler time to prepare the case so as to be able to provide effective assistance of  
6 counsel. *See Lam*, 251 F.3d at 858 (It would be “inappropriate to permit [defendant] to avoid  
7 responsibility for legitimate delays which were necessary for and beneficial to his defense.”).  
8 Accordingly, this delay is attributable to Christian. *See id.* at 857-58 (“In attributing responsibility [for  
9 the delay] to [defendant’s] counsel, we also find such responsibility rightfully accrues to [defendant].”)

10 The second stipulated continuance, though objected to by Christian, also is attributable to him.  
11 The second stipulation was filed concurrently with Shetler’s *ex parte* motion for a psychiatric  
12 evaluation. The motion for psychiatric evaluation was made following the state court’s determination  
13 that Christian was not competent to stand trial. The motion was not made for any improper purpose,  
14 inasmuch as it would have been imprudent for Shetler to ignore the state court’s determination. The  
15 continuance was requested to allow time for the court to rule on the motion for psychiatric evaluation  
16 and to allow for the evaluation itself to occur. *See Corrected Second Stip.* (#37) at ¶ 5. Inasmuch as  
17 the psychiatric evaluation was requested by Christian’s counsel and for the benefit of establishing  
18 Christian’s ability to stand trial and to assist in his own defense, this second continuance to allow time  
19 for the evaluation is attributable to Christian.

20 While the court ultimately denied without prejudice the motion for psychiatric evaluation, it did  
21 so as a result of Christian’s request for new counsel, his third, at the hearing on Shetler’s motion for a  
22 psychiatric evaluation. Meyers was appointed to represent Christian. Meyers filed a third stipulated  
23 request for continuance to allow for a psychiatric evaluation of Christian. This continuance is also  
24 attributable to Christian for the same reasons explained above. Inasmuch as all of the continuances have  
25 been for his own benefit or for the benefit of his counsel in representing him, the court finds that the  
26 second *Barker* factor, reason for delay, weighs heavily against Christian’s motion to dismiss for speedy

1 trial violation.

2 The court now turns to the third factor, defendant's assertion of speedy trial right. Assertion of  
3 the speedy trial right is entitled to strong evidentiary weight, but it also must be viewed in light of the  
4 defendant's other conduct. *See United States v. Loud Hawk*, 474 U.S. 302, 314-315 (1986). For  
5 example, where, as here, the delay of trial is attributable to the defendant, the weight of his assertion  
6 of speedy trial right is diminished. *Lam*, 251 F.3d at 859 (finding defendant's attorney's repeated  
7 requests for continuances were attributable to defendant, and therefore "considerably diminish the  
8 weight of [defendant's] assertions of his speedy trial right").

9 Christian did file in proper person, and the court dismissed, two motions to assert his speedy  
10 trial right. *See* Order Striking Filed Document (#16) and Order Striking Filed Document (#31).  
11 Notably, the first of these was filed a mere nine days after Christian's initial appearance and the other  
12 was filed one day after his first request for new counsel was granted by this court. Neither motion, even  
13 if properly filed, could have survived the threshold inquiry as to presumptively prejudicial delay, insofar  
14 as both were filed within two months of Christian's initial appearance. Moreover, the first Stipulation  
15 to Continue, in which it is stated that Christian consented to the continuance, was filed after the stricken  
16 speedy trial motions. Christian now maintains that he did not agree to any continuances. Even so, as  
17 the court has explained, the continuances were necessary so that Christian's counsel could prepare for  
18 trial, and also to accommodate the psychiatric evaluation of Christian. Because Christian's counsel's  
19 requests for continuances are properly attributable to Christian and because Christian's early assertions  
20 of speedy trial lacked merit, the weight of his assertions is severely diminished. *See Lam*, 251 F.3d at  
21 859. The court will not weigh this factor in Christian's favor.

22 The final *Barker* factor requires the court to weigh the prejudicial effect, if any, of delay.  
23 "Actual prejudice can be shown in three ways: oppressive pretrial incarceration, anxiety and concern  
24 of the accused, and the possibility that the accused's defense will be impaired." *Beamon*, 992 F.2d at  
25 1014 (citing *Doggett*, 505 U.S. at 654). Where the defendant himself is responsible for the delay, he  
26 carries a heavy burden of demonstrating actual prejudice. *Lam*, 251 F.3d at 859 (citing *United States*

